
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)
)
GEORGE B. EUNICE) Adversary Proceeding
p/d/b/a B's Package Shop) Number 92-4187
(Chapter 7 Case 92-40733))
)
Debtor)
)
)
)
UNITED STATES FIDELITY)
AND GUARANTY COMPANY)
)
Plaintiff)
)
)
)
v.)
)
GEORGE B. EUNICE)
)
Defendant)

MEMORANDUM AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

Plaintiff filed an adversary against the Debtor alleging that a District Court Judgment was non-dischargeable. A pre-trial hearing was held on December 3, 1992. On January 4, 1993, Plaintiff filed a Motion for Summary Judgment, alleging that the issues decided in the District Court proceeding should constitute collateral estoppel on the issue of non-dischargeability. Upon consideration of the Motion for Summary Judgment, the

Complaint, and the documentation submitted by the parties, together with applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Plaintiff sued Defendant/Debtor in the District Court in 1992. A jury trial was held in May 1992, and a jury verdict was rendered awarding Plaintiff a recovery of \$37,936.19. A judgment was entered against Defendant on or about May 26, 1992.

Plaintiff alleges that the judgment should be non-dischargeable in bankruptcy as arising out of a willful and malicious injury, 11 U.S.C. Section 523(a)(6), by the Debtor and as Debtor obtained funds from Plaintiff based on false pretenses or fraud under 11 U.S.C. Section 523(a)(2)(A).

The Debtor sued Plaintiff in District Court alleging that Plaintiff/Insurance Company acted in bad faith when it denied Debtor's claim for fire loss and damages under an insurance policy. Debtor alleged that Plaintiff breached the insurance agreement. *See* District Court Consolidated Pre-Trial Order filed with Motion for Summary Judgment on January 4, 1993.

On December 5, 1990, fire totally destroyed Debtor's residence. Debtor filed the appropriate papers and claim forms and received \$2,500.00 for living expenses. Plaintiff paid the mortgageholder, Georgia Federal Bank, \$35,466.19, to satisfy the mortgage. No further payments were made under the insurance agreement within sixty days

after the proof of loss was filed. On March 29, 1991, Debtor submitted a formal demand for payment. No other payments were made to Debtor. Debtor claimed in the District Court that he was owed \$22,053.81, the balance of the policy amount after the mortgage payment, as the replacement costs of his residence and belongings were greater than the insurance policy coverage of \$57,500.00. Debtor filed his District Court suit to obtain payment under the policy and damages.

Plaintiff contended in the District Court that Debtor intentionally burned his residence or procured the intentional burning of the residence. Further, Plaintiff alleged that Debtor concealed and misrepresented facts and circumstances regarding the insurance claims. According to Plaintiff, an intentional burning is not covered by insurance, and the insurance policy is void due to Debtor's misrepresentations. Plaintiff filed a counterclaim against Debtor to obtain reimbursement for paying the mortgage and for the \$2,500.00 payment for living expenses.

In the District Court's Pre-Trial Order, the parties stated that Plaintiff/Insurer had "the burden of proof in proving its affirmative defense of arson and claim [of] fraud and its counterclaim." The District Court also addressed the burden of proof in its instructions to the jury:

In this case each party asserting a claim or a defense has the responsibility to prove every essential part of his contention by a "preponderance of the evidence." This is sometimes called the "burden of proof" or the "burden of persuasion."

See Court's instructions to the jury, page 6, filed with the Motion for Summary Judgment.

The Court instructed the jury further as follows:

In an action for fire insurance proceeds, if the insured has either intentionally burned the building or has caused it to be burned, or has misrepresented or concealed any material facts in connection with his claim, his insurance policy is void and he may not recover.

Insofar as this case involves alleged intentional burning of a structure, the burden of proof is on the defendant to establish this matter by a preponderance of the evidence.

With respect to the defense of the intentional burning, in order for you to find that George Eunice willfully or deliberately caused the fire so as to prevent recovery, you must find from the greater weight of the evidence:

1. That the fire was of incendiary origin; that is, that the fire did not occur through accident or negligence but that it was deliberately and intentionally set by the act of some person with the intent to cause the destruction of the home and contents;

. . . . USF&G's insurance policy in this case provides that George Eunice may not recover any money if he has willfully concealed or misrepresented any material fact or circumstance concerning the insurance claim or the loss . . . If you find, therefore, that George Eunice misrepresented or concealed material facts or swore falsely to the insurance company after the loss, then George Eunice may not recover from USF&G.

A fraudulent misrepresentation is a misrepresentation of fact knowingly made as a misrepresentation . . .

See Court's Instructions to the Jury. The jury rendered a verdict in favor of Plaintiff/Insurer,

the Defendant in the District Court action. A judgment was entered there after.

CONCLUSIONS OF LAW

On this Motion for Summary Judgment, the moving party bears the initial burden of showing the absence of any genuine issue of material facts. Bald Mountain Park, Ltd. v. Oliver, 863 F.2d 1560 (11th Cir. 1989). Once the movant has carried its burden of proof, the burden shifts to the non-moving party to demonstrate that there is sufficient evidence of a genuine issue of material fact. U.S. v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991).

Plaintiff argues in its Motion for Summary Judgment that the doctrine of collateral estoppel should prevent Debtor from relitigating issues decided by the jury.

The Eleventh Circuit has discussed the application of collateral estoppel in bankruptcy non-dischargeability actions. In re Latch, 820 F.2d 1163 (11th Cir. 1987); In re Halpern, 810 F.2d 1061 (11th Cir. 1987); Balbierer v. Austin, 790 F.2d 1524 (11th Cir. 1986); In re Held, 734 F.2d 628 (11th Cir. 1984). The bankruptcy court should use collateral estoppel or issue preclusion to "reach conclusions about facts that the court would then consider as 'evidence of non-dischargeability'." Halpern, supra at 1064.

In order to properly apply collateral estoppel three elements must be present:

- 1) The issue at stake must be identical to the one involved in the prior litigation;

- 2) The issue must have been actually litigated in the prior litigation; and
- 3) The determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that earlier action.

Halpern, supra at 1064 (citing Held, supra at 629).

First, the issues must be identical. In the jury trial, to reach the verdict it did, the jury could have concluded that Debtor intentionally set the fire, or arranged to have another set the fire (and implicitly if the jury concluded that the fire was intentional, the jury must have concluded that Debtor fraudulently misrepresented his insurance claim). Alternatively, the jury could have concluded that Debtor was not responsible for setting the fire, but nevertheless fraudulently misrepresented his claims under the insurance policy. In either case the jury must have concluded that Debtor fraudulently misrepresented his claim.

Under Section 523(a)(2)(A) a debt:

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition is non-dischargeable.

11 U.S.C. §523(a)(2)(A). Generally, a creditor must prove the following in order to preclude a debt for fraud:

(1) The debtor made a false representation with the purpose and intention of deceiving the creditor;

- (2) The creditor relied upon such representation;
- (3) The reliance was reasonably founded; and
- (4) The creditor sustained a loss as a result of the representation.

In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986).

The jury awarded Plaintiff \$37,936.19 for reimbursement for payments on Debtor's behalf. The jury must have concluded that Plaintiff made the payments in reliance on Debtor's fraudulent misrepresentations in his insurance claim. I conclude that the dischargeability issue of fraud and the fraudulent misrepresentation issue decided by the jury are the same.

As the District Court judgment was entered after the completion of a jury trial and upon the jury's verdict, clearly, the issues were actually litigated. Also, the jury's consideration of fraudulent misrepresentation was a critical and necessary part of the judgment and was essential to the jury's denying all claims of Debtor and awarding a verdict in favor of Plaintiff.

Additionally, a finding of arson or intentional burning would be sufficient to satisfy the requirements of a willful and malicious injury under 11 U.S.C. Section 523(a)(6), particularly where a party caused the burning to induce payment of insurance proceeds. However, it is not clear that the jury concluded that Debtor willfully or intentionally set the fire. Either the Debtor set the fire and made a fraudulent misrepresentation or merely made a fraudulent representation to the insurer. In either

scenario, the jury in reaching its verdict must have concluded that the Debtor fraudulently misrepresented his claim or otherwise made a false statement to the insurer, which satisfies the requirements of non-dischargeability for fraud under 11 U.S.C. Section 523(a)(2)(A).

I can find no material issue of fact in this case. In light of the foregoing, Plaintiff's Motion for Summary Judgment should be granted. Debtor's obligation to Plaintiff in the amount of \$37,936.19 should be excepted from discharge.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that judgment be entered in favor of Plaintiff, United States Fidelity and Guaranty Company, and against Debtor, George B. Eunice, in the amount of \$37,936.19 and that said sum be excepted from Debtor's discharge in this case.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of February, 1993.